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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

## No. 127

E. CREEKMORE, GENERAL CHAIRMAN OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, ET AL.,

Petitioners,

*versus*

PUBLIC BELT RAILROAD OF NEW ORLEANS and CITY OF NEW ORLEANS, ET AL.,

Respondents.

**BRIEF ON BEHALF OF THE PUBLIC BELT RAILROAD COMMISSION FOR THE CITY OF NEW ORLEANS AND THE CITY OF NEW ORLEANS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

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Petitioners,

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**BRIEF ON BEHALF OF THE PUBLIC BELT RAILROAD COMMISSION FOR THE CITY OF NEW ORLEANS AND THE CITY OF NEW ORLEANS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

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*To the Honorable, the Supreme Court of the United States:*

### STATEMENT OF THE CASE.

Petitioners brought this suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division, under the "Fair Labor Standards Act of 1938", Title 29 USCA, Secs. 201-219 (52 Stat. 1060)

against the Public Belt Railroad Commission for the City of New Orleans and the City of New Orleans for an alleged under payment of wages to certain employees of the Public Belt Railroad, plus an equal amount as liquidated damages, and attorney's fees.

Petitioners alleged that the Public Belt Railroad Commission "is a corporation or political entity, existing by virtue of the Constitution of the State of Louisiana, statutes of said State, and also by virtue of Ordinance No. 2683, New Council Series of the City of New Orleans, * * *."

Both the City of New Orleans and the Public Belt Railroad Commission for the City of New Orleans moved the District Court to dismiss petitioners' action because both their complaint and their supplemental and amended complaint failed to state a claim upon which relief could be granted.

The basis of respondents' motion to dismiss was that the operation of the Public Belt Railroad is by the City of New Orleans, by and through the Public Belt Railroad Commission for the City of New Orleans, and, the City of New Orleans, being a political subdivision of the State of Louisiana, is excluded in its operations of said Railroad, by and through the Public Belt Railroad Commission, by the very terms of the Fair Labor Standards Act of 1938 itself.

The District Court granted respondents' motion to dismiss and dismissed petitioners' complaint (R. p. 58). The opinion of the District Court will be found at R. p. 54.

Petitioners then appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which Court affirmed the decision of the District Court (R. p. 72). The opinion of the Court of Appeals will be found at R. p. 69.

## QUESTION INVOLVED.

The sole question involved herein is whether or not the City of New Orleans in its operation of the New Orleans Public Belt Railroad, by and through the Public Belt Railroad Commission for the City of New Orleans, is exempt from the provisions of the "Fair Labor Standards Act of 1938".

Paragraph (d), of Sec. 203, of Title 29 USCA, defines an "Employer" as follows:

> "(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

## THE LAWS APPLICABLE TO THE PUBLIC BELT RAILROAD.

Although the complaint made both the City of New Orleans and the Public Belt Railroad Commission parties defendant, nevertheless, the Public Belt Railroad is, as heretofore stated, operated by the City of New Orleans, through said Commission.

The Public Belt Railroad Commission was originally created by Ordinance No. 147, New Council Series, of the City of New Orleans, adopted August 7, 1900. Thereafter, the Council, of the City of New Orleans adopted, on October 4, 1904, Ordinance No. 2683, New Council Series, which ordinance amended and re-enacted certain sections of Ordinance No. 147, N. C. S., repealed other sections thereof, and added new sections thereto. (R. p. 31).

The General Assembly of the State of Louisiana, by Act 179 of the Acts of 1908, authorized the City of New Orleans to issue $2,000,000 of bonds and to expend the proceeds of said bonds for the construction and equipment of a Public Belt Railroad system in and for the City of New Orleans. Said act provided that "the City of New Orleans shall construct, equip, maintain and operate said Public Belt Railroad System of the City of New Orleans through and by means of such board, or commission, as may have been or may be organized by the City of New Orleans, the members of which shall be appointed by the Mayor of the City of New Orleans with the consent of the Council, the powers, duties and functions of which shall be prescribed by the City of New Orleans." Said Act was submitted to the qualified electors of the State on November 3, 1908, and ratified. (See also Art. XIV, Sec. 26, Constitution of Louisiana, 1921).

By Act No. 68 of the Acts of 1916, the General Assembly of the State of Louisiana adopted a joint resolution proposing an amendment to the Constitution of the State of Louisiana, granting to the City of New Orleans power to construct, equip, maintain and operate, through and by

the Public Belt Railroad Commission of the City of New Orleans, bridges and tunnels across the Mississippi River at or near New Orleans, and to do various acts incidental thereto and to the operation generally of the Public Belt Railroad system of the City of New Orleans and providing for the submission of said amendment to the electors of the State for their approval or rejection. Said amendment was submitted to the qualified electors of the State on November 7, 1917, and ratified.

By Act No. 167 of the Acts of 1916, the General Assembly of the State of Louisiana amended Act No. 159 of the Acts of 1912 (the Charter of the City of New Orleans) so as to include therein additional provisions authorizing and empowering said City of New Orleans to extend, maintain, operate and develop its Public Belt Railroad system beyond the Parish of Orleans into any adjoining parish or parishes.

By Act No. 188 of the Acts of 1918, the General Assembly of the State of Louisiana adopted a joint resolution proposing an amendment to the Constitution of the State granting to the City of New Orleans an extension of time for the commencement and completion of the construction of a bridge or tunnel across the Mississippi River, under said Act No. 68 of 1916. Said amendment was ratified by the electors of the State on November 5, 1918.

In the Constitution of the State of Louisiana, adopted in 1921, Article XIV, Section 26, again provided that "It shall be the duty of the City of New Orleans to continue

the operation of a Public Belt Railroad by and through a commission to be known as the Public Belt Railroad Commission for the City of New Orleans, * * *."

By Article XIV, Section 27, of said Constitution of 1921, the City was authorized to issue New Orleans Public Belt Railroad Bonds, in a sum not to exceed $5,000,000, and by Section 28 thereof the City, acting through the Public Belt Railroad Commission, was granted the power to bridge the Mississippi River and to acquire and operate railroad facilities.

By Act No. 154 of the Acts of 1928, the Legislature of Louisiana adopted a joint resolution proposing an amendment to said Article XIV, Section 28, of the Constitution with regard to the construction of the bridge aforesaid. Said amendment was ratified by the electors of the State on November 6, 1928.

By Act No. 385 of the Acts of 1938, the Legislature of Louisiana adopted a joint resolution proposing another amendment to Article XIV of the Constitution, to be known as Section 31.3, to authorize the City of New Orleans, acting through the Public Belt Railroad Commission, to acquire, construct and maintain one or more railroad passenger stations in the City of New Orleans. Said amendment was ratified by the electors of the State on November 8, 1938.

The Supreme Court of the State of Louisiana has held in three cases that the Public Belt Railroad is owned

and operated by the City of New Orleans, acting by and through the Public Belt Railroad Commission for the City of New Orleans.

In *Davis v. New Orleans Public Belt Railroad*, 155 La. 504 (99 So. 419), the Court at p. 509, held as follows:

> "Its nature and purpose still remain the same, i. e., that it is a department of the city of New Orleans * * *."

In *Solomon v. City of New Orleans*, 156 La. 629 (101 So. 1), the Court, after referring to Act 179 of the Acts of 1908, and after stating that the entire and absolute control and administration of the Public Belt was recognized and confirmed in the City, to be exercised through a Commission to be appointed, or which had already been appointed, by the City, said:

> "Our conclusion is that the public belt railway system of New Orleans is owned and operated by the city * * *."

In *Higginbotham v. Public Belt Railroad Commission*, 192 La. 525 (188 So. 395), the Court held that the deceased was employed by the Commission which is, under the law, an agency of the City, and on page 544, said:

> "It thus appears that the Public Belt Railroad and the Huey P. Long Bridge were built and are maintained, controlled, and operated by the same authority or agency, the Public Belt Railroad Commission of the City of New Orleans * * *."

It will, therefore, be seen that by City Ordinance, Legislative Acts and Constitutional Provisions, and as held by the Supreme Court of Louisiana, the Public Belt Rail-

road is owned, operated and maintained by the City of New Orleans, by and through the Public Belt Railroad Commission for the City of New Orleans.

The Railroad operates exclusively as a switching line. It is not a stock corporation, nor even a separate entity; but is owned and operated directly by the City of New Orleans, through the Public Belt Railroad Commission.

The Supreme Court of Louisiana in *State v. Maitrejean*, 193 La. 824, 192 So. 361, said that "Municipal corporations are subdivisions of the state, * * *", and in *State v. Coulon*, 197 La. 1058, 3 So. 2d. 241, that "Parishes, municipalities, road districts, irrigation districts, drainage districts, etc., are political subdvisions of the state, created not by the Constitution but by the Legislature."

Petitioners in their petition, at p. 3 thereof, state that "The Trial Justice dismissed the amended complaint filing a written opinion (R. p. 58) holding that the Public Belt Railroad being wholly owned and operated by the City of New Orleans was expressly excluded by virtue of Section 3 (d) of the Act in that it was 'a political subdivision of a State' ". That is not exactly correct. The Trial Justice held (R. p. 55) that "The City of New Orleans is a political subdivision of the State of Louisiana; and, as was held in Davis vs. New Orleans Public Belt Railroad, 155 La. 504, 99 So. 419 (1923), the Public Belt Railroad Commission is a department of that City."

## THE STATUTE DOES NOT NEED CONSTRUCTION.

Petitioners argue that the Congress intended that the Public Belt Railroad and, therefore, necessarily, the City of New Orleans, in its operation of the Public Belt Railroad, should be covered by and not exempted from the provisions of the act.

We respectfully submit that Paragraph (d) of Section 3 is perfectly clear when it excepts from the definition of "Employer" any State "or political subdivision of a State" and, therefore, there is no occasion in the case at bar to resort to rules of construction, the language being so plain as not to need construction.

In *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, at p. 277, this Court said:

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction."

and at p. 278:

> "But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."

The District Court found (R. p. 57) that "Following the plain meaning of the statute's language, * * * leads to no absurd or impracticable consequences, nor thwarts the obvious purpose of the statute", and the Court of Appeal found (R. p. 71) that "The language of Section 3 (d) being plain, its meaning clear, the result reasonable, we see no reason for resorting to extraneous considerations in an effort to construe and give to such language another and different meaning."

In *Helvering v. New York Trust Co.*, 292 U. S. 455, at p. 464, this Court said:

> "The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose."

In *Kuehner v. Irving Trust Co.*, 299 U. S. 445, at p. 449, this Court said:

> "The legislative history of this provision, and the successive alterations of its wording in both houses of Congress and in conference, to which we are referred, cannot affect its interpretation, since the language of the act as adopted is clear."

In *Osaka Shosen Line v. United States*, 300 U. S 98, at p. 101, which was a case that went up to this Court from the Court below, this Court said:

> "To say that the passenger has not been brought to the United States unless the intent was to leave him here, is not to construe the statute but

to add an additional and qualifying term to its provisions. This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction."

In *Helvering v. City Bank Co.*, 296 U. S. 85, at p. 89, this Court also said:

> "We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used."

In *Federal Deposit Insurance Corporation v. Winton*, 131 Fed. 2d. 780, the Court of Appeals for the Sixth Circuit, citing Helvering v. N. Y. Tr. Co., supra; United States v. Mo. Pac. R. Co., supra, and other cases, said:

> "In our view of the case we are not required to determine whether the interpretation placed by the court upon Clause (i) (1) of 12B of the Act would tend to prevent contemplated evils because we find no room for interpretation or construction at all. The words 'less all subsequent withdrawals from any deposits of such depositor' as they appear in the italicized portion of the statute quoted are plain, simple and explicit. There is nothing doubtful about their meaning. The obvious meaning of the entire phrase, and one that is supported by Webster's definition of the word 'any' as 'one indiscriminately of *whatever kind* or quantity' (italics added), is that after the date of termination F. D. I. C.'s liability would be reduced by every withdrawal from deposits of the depositor of whatever kind and whenever made. There is no room for the construction of an unambiguous statute; not even where the purpose is to remove an apparent hardship."

Petitioners cite as authority for the holding that courts are not always confined to the literal meaning of a statute, because the letter, purpose and intent of the legislature will prevail over the literal import of the words, *Shelvy v. Guy*, 24 U. S. 361; *Chicago, etc., R. R. Co. v. Guffey*, 122 U. S. 561; *United States v. Holy Trinity Church*, 143 U. S. 457; and *Brown v. Duchesne*, 60 U. S. 183.

In *Shelvy v. Guy* there was involved the terms "beyond seas" in a state statute of limitation. At p. 369 the Court said "Nevertheless, as this cause must go back upon other grounds, we will, for the present, waive a positive decision on this point as applied to the State of Tennessee * * *."

The question in *Chicago, etc., v. Guffey*, was whether or not the word "lease" in a statute of Missouri included the word "purchase" because in part of the statute reference was made to "lease or purchase" and the holding there is not applicable to the case at bar.

In the *Holy Trinity Church* case, the question was whether or not the word "labor" included a minister of the gospel and the Court held that the common understanding of the term "labor" did not include preaching and preachers. That case, likewise, has no application hereto.

In *Brown v. Duchesne*, a patent infringement was involved. The Court there said that in expounding a statute, it would not give to it a construction which would in any degree disarm the government of a power which had been confided to it to be used for the general good "*unless*

*plain and express words indicated* that such was the intention of the legislature."

Petitioners cite *Richardson v. Harmon*, 222 U. S. 96, as authority for what they state is the well settled rule that the court will not look to a particular clause of an act only, in order to arrive at the intention of the law maker. The question there involved was whether or not the limited liability act in admiralty, which limits the liability of a ship owner to the proportion of any debts and liabilities, included any and all liability of the owner, whether maritime or not, and the court said that the provision was not as definite as desirable might be conceded.

Petitioners cite *Converse v. U. S.*, 62 U. S. 463, to the effect that statutes relating to the same subject are to be compared and should be read and construed in reference to each other. In that case, which involved certain claims for commissions against the Treasury Department, the court said:

> "The question to be decided on this exception is undoubtedly one of some difficulty. But the difficulty arises not so much from ambiguity of language in any one of the acts of Congress, as from the great number of acts passed from time to time on this subject, which have been referred to in the argument. They, for the most part, differ in language in some degree from one another, and are generally introduced in some clause or proviso of the usual annual appropriation law, or an appropriation to provide for previous expenditures, and yet all bear, with more or less force, on the question before us.
>
> * * * * * *

> "It is obvious, therefore, that in order to carry into execution the intention of the legislative department of the Government, these various laws on the same subject-matter must be taken together and construed in connection with each other."

The case of *State v. Gerhardt*, 44 N. E. 469, has reference to statutes regulating the sale of liquors. It seems that the legislature had for many years passed laws regulating and restricting such sales and the statutes involved and the facts in that case are not apposite.

## OTHER FEDERAL LEGISLATION.

Petitioners say that the Lower Court completely ignored all other Federal legislation passed by the Congress of the United States on behalf of railroad employees, which was binding and covered all of the employees of the Public Belt Railroad, and refer to "The Safety Appliance Act", the "Hours of Service Act", the "Retirement of Railway Employees Act" and the "Railway Labor Act" as being applicable to the employees of the Public Belt Railroad. These statutes although applicable to railroads in general are not all on the same subject-matter and, therefore, there is no necessity or reason to construe the law involved herein in connection with any other law.

Petitioners cite the case of *State of California v. Anglim*, 129 F. 2d. 455. There the State of California attempted to evade the Carriers Taxing Act of 1937, 45 USCA 261, on the ground that the Constitution gave the Congress no power to impose the tax on it, and not as here, that it was excluded or exempted from the statute by the very wording of the statute itself. Neither the Carriers'

Taxing Act of 1937, nor the Retirement of Railway Employees Act, which were companion bills enacted at about the same time, the one to provide the revenue to make the expenditures for the other, exempted or excluded a State or any political subdivision of a State from its provisions.

## THE CLAIMED EXEMPTION DOES NOT LEAD TO IMPRACTICABLE CONSEQUENCES.

Petitioners next contend that a strict construction should be placed on the claimed exemption of the respondents and the most liberal construction on the claimed coverage by the petitioners and that, construing the "Fair Labor Standards Act", "we have a Federal statute setting a minimum wage standard and yet the statutory bargaining agent is powerless under such Federal statute to compel the railroad carrier to pay the minimum wage ordered for all other railroad employees in the United States in the Maintenance of Way Department of railroads." They further contend that "It would be a strange rule of construction that would lead us into the 'bad results' and 'injurious consequences' by holding this carrier to be exempt under the Act". Both the Trial Court and the Lower Appellate Court held that excluding such employees does not lead to any absurd or impracticable consequences.

Petitioners cites *U. S. v. California*, 297 U. S. 175, as holding that a terminal railroad owned and operated by a State for the same purpose as respondents' railroad was subject to the Federal Safety Appliance Act. We have never denied that respondents are subject to the Federal Safety Appliance Act or any of the other mentioned acts applicable to railroads.

The exclusion from the provisions of the Fair Labor Standards Act of "the United States or any State, or political subdivision of a State," was not haphazardly done, but it was clearly the intention of the Congress to so exclude them. We find the same exclusion in the National Labor Relations Act of 1935, 29 USCA 151, Section 152, par. (2), of which provides that "The term 'Employer' includes any person acting in the interest of an Employer directly or indirectly, but shall not include the United States or any State or political subdivision thereof * * *", and in the Social Security Act, 42 USCA 301, Section 409, par. (b), sub. par. (7), of which excepts therefrom "Service performed in the employ of a State or any political subdivision thereof * * *". Respondents are likewise not subject to the Federal Income Tax Law. Section 116 (d) of the Internal Revenue Code exempts from taxation "Income derived from any public utility or the exercise of any essential Governmental function and accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, * * *."

Petitioners also argue that in order to bring themselves within the exception under the act as a "political subdivision" respondents must bring themselves not only within the letter of the exception, but the spirit of the exception, and quote from *Bowie v. Gonzalez*, 117 F. 2d. 11. That case has no application. It involved the application to certain phases of the sugar industry in Puerto Rico of the Fair Labor Standards Act. There appellants maintained that they were exempt from both the wages and

hours provisions of the act on the ground that all of their employees were engaged in agriculture, and it was necessary for the Court to determine whether or not the processing of sugar cane into sugar was included within the term "agriculture", and the Court held that only the employees engaged in planting, cultivating and harvesting of the sugar cane, came under the exclusion.

Petitioners also quote from *Fleming v. Hawkeye Pearl Button Co.*, 113 F. 2d. 52. In that case, the question was whether or not the employees of a company making buttons from clam shells were exempt from the wage and hour provisions of the Act by virtue of the exemption contained in Section 13 (a) (5), which provides that Sections 6 and 7 shall not apply to "* * * any employee employed in the catching, taking, harvesting, cultivating or farming of any kind of fish, shell fish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, * * *." The Court said:

> "The meaning of the statute must in the first instance at least be sought in its language, and if that is plain and the act is Constitutional, the sole function of the Court is to enforce it. (Citing case). If the statutory meaning is clear, there is, of course, no occasion to resort to rules of construction."

We respectfully submit that paragraph (d) of Section 3 of the Act is perfectly clear when it excepts from the definition of "Employer" any state "or political subdivision of a State". There is, therefore, no occasion to resort to rules of construction, as there was such occasion in the *Hawkeye Button Company* case.

Petitioners then quote from *U. S. v. American Trucking Association*, 310 U. S. 534, and quote from page 543. There again it was necessary to interpret the Federal Motor Carrier Act. In the very words quoted by petitioners, the Court said:

> "There is, of course, no more pursuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."

Petitioners also cite to the same effect *Town of Clayton v. Colorado and S. Ry. Co.*, 51 F. 2d. 977, and *Barrett v. Van Pelt*, 268 U. S. 85.

In the *Clayton* case, the Court said:

> "Where the language of a statute is plain and unambiguous, and conveys a clear and definite meaning, resort must not be had, ordinarily, to rules of construction, but the statute must be given its plain and obvious meaning.
>
> * * * * * *
>
> "Had the Legislative body intended to exempt railway property from assessment as abutting property, the natural and ordinary method would have been to have added an exception to the general language of the original act."

In the *Barrett* case the Court said that

> "The language and structure of the second clause is so inapt and defective that it is difficult to give it a conclusion that is wholly satisfactory".

## ADMINISTRATIVE RULING.

In answer to a letter written by us to "The Administrator of the Wage and Hour Division" on October 25, 1938 (R. p. 51), we received a letter signed by the Assistant General Counsel of the United States Department of Labor, Wage and Hour Division, Washington, D. C., dated July 10, 1939 (R. p. 53), in which he stated:

> "If the Public Belt Railroad System is wholly owned and controlled by the City of New Orleans, a political subdivision of the State of Louisiana, through the Public Belt Railroad Commission for the City of New Orleans, *it is our opinion that the employees of the Public Belt Railroad System are not subject to the Act by reason of the provision quoted above contained in Section 3 (d).*" (Italics ours).

It is true that administrative opinions or rulings are not binding upon the courts. Nevertheless, they are "entitled to great weight".

In *United States v. Amer. Trucking Ass'ns*, 310 U. S. 534, this Court, referring to an interpretation by the Interstate Commerce Commission and the Wage and Hour Division, of Section 204 (a) of the Motor Carrier Act, 1935, at P. 549, said:

> "The Commission and the Wage and Hour Division, as we have said, have both interpreted Sec. 204 (a) as relating solely to safety of operation. *In any case such interpretations are entitled to great weight.*" (Italics ours).

In *Missel v. Overnight Motor Transp. Co.*, 36 Fed. Sup. 980, the United States District Court for the Eastern District of Maryland, at p. 985, said:

> "In addition to the reasons just mentioned, there is something else which is at least very persuasive. It is this: As already shown, after the Wage and Hour Division of the Department of Labor, on March 25, 1939, ruled that all employees of common and contract carriers by motor vehicle, other than drivers, would be subject to the Fair Labor Standards Act with respect to hours, unless and until an order of the Commission determined to the contrary, the Commission itself formally confirmed this ruling on May 16, 1939 (Ruling No. 79). *Such action is entitled to great weight.*" (Italics ours).

In the same case, the United States Court of Appeals for the First Circuit, in 126 F. 2d. 98, at p. 108, said:

> "Although such interpretations are by no means binding on the courts, *we consider them highly significant.*" (Italics ours).

The *Missel* case came before your Honors just last year (see *Overnight Motor Co. v. Missel*, 316 U. S. 572), and there at p. 580 you said:

> "This has been the Administrator's interpretation of the Act. Interpretative Bulletin No. 4 issued October 21, 1938, revised November, 1940. While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application."

In *Bumpus v. Continental Baking Co.*, 124 F. 2d. 549, the Court held that

> "The contemporaneous construction of those charged with the administration of the provisions of a new law is entitled to great respect, Edwards' Lessee v. Darby, 12 Wheat. 206, 210, 6 L. Ed. 603, and has bearing here."

In *Bayley v. Southland Gasoline Co.*, 131 F. 2d. 412, at p. 414, the Court said:

> "Such interpretations by the agencies charged with the administration of the Acts are entitled to great weight."

## NO DISTINCTION BETWEEN GOVERNMENTAL AND PROPRIETARY FUNCTIONS.

Petitioners try to draw a distinction between the functions of a State or a political subdivision when acting in its governmental and when acting in its proprietary capacity and cite several cases in connection therewith. We have never claimed that the City of New Orleans in the operation of this railroad system was acting in its governmental capacity; but, no distinction or exception is made in Section 3 (d) of the Act between a political subdivision of a State when acting in its governmental capacity and in its proprietary capacity. In fact the Wage and Hour Division of the Department of Labor drew no such distinction when it said:

> "Sec. 3 (d) justifies no distinction between governmental and proprietary functions of a municipality, and a wholly municipally owned switching and terminal company is exempt from the Act." (See Commerce Clearing House "Labor Law Service", Third Edition, Volume 2, at par. 23,600.37, W & H opinion letter, April 7, 1941).

Petitioners on this phase of the question refer to the leading case of *Helvering v. Powers*, 293 U. S. 13, where the question presented was whether the compensation of the members of the Board of Trustees of the Boston Elevated Railway Company was constitutionally exempt from the imposition of a federal income tax. The Court there held that the members of this Board of Trustees were subject to the tax, not because they were employees of a State or instrumentality of its government, but because the very act of the Commonwealth of Massachusetts provided "that the trustees and their employees shall be deemed to be acting as agents of the company, and not of the Commonwealth, and that the company shall be liable for their acts of negligence to the same extent as if they were in the immediate employ of the company * * *." Petitioners quote from page 223 of the decision, where the Court said:

> "While the undertaking is for the public benefit, it is still a particular business enterprise—the operation of a street railway—and the functions of the trustees are limited accordingly."

but they failed to quote the very next succeeding sentence to the following effect:

> "The property remains in private ownership."

There also the immunity sought by the trustees from payment of the federal income tax had not been granted by the Congress. The definitions of income in the Federal Income Tax Acts cover income derived "from compensation for personal services * * * of whatever kind and in whatever form paid," and the Court said that "this language is certainly broad enough to embrace the compensation of the trustees, and the immunity, if it exists, must rest upon

constitutional limitation." The taxing power of the Federal Government is not involved in the case at bar, such as it was in the *Helvering* case.

The case of *South Carolina v. United States*, 199 U. S. 435, also cited by petitioners, again involved certain employees of the state who sought exemption from liability under the internal revenue tax.

We have no quarrel with the cases of *Oliver v. Worcester*, 102 Mass. 489; *Western Savings Funds Society v. Philadelphia*, 31 Pa. 175; *Davoust v. Alameda*, 84 Pa. 760; *Baker & Co. v. Hollis*, 36 Pac. (2d) 757, or *O'Donnell v. N. Attleborro*, 98 N. E. 1084. Even our Supreme Court has held that the City of New Orleans, in its operation of the Public Belt Railroad, was liable for its torts. But being liable for its torts and being subject to an act which specifically exempts or excludes it from its operation is an entirely different matter.

Petitioners then cite the case of *Boston Elevated Railway Company v. Welch*, 25 F. Supp. 809, which was the same company involved in the case of *Helvering v. Powers*, supra. This case involved the Social Security Act. That Act excepted from the term "employment" "services performed in the employ of a state, political subdivision thereof or an instrumentality of one or more states or political subdivisions." The Court said:

> "If the plaintiff is within the meaning of the term 'instrumentality' then this regulation clears the way for its recovery and removes the possibility

> of a bar to such recovery, because the plaintiff was not engaged in an essential governmental function. It will first be necessary to bring the plaintiff within the classification of the statute, however, before it can lay claim to anything by virtue of the regulation."

The Court went on to find, as it did in the *Helvering* case, that the Boston Elevated Railway Company still existed as a corporation, but had merely abdicated its right to manage its properties; that the business was still conducted in the name of the company and all contracts for labor and supplies relating to the operation of its railway were made in its name; and that the act creating the trustees expressly provided that the trustees "shall be deemed to be acting as agents of the company and not of the Commonwealth." The Court then concluded that

> "the plaintiff (the Boston Elevated Railway Company) is not an instrumentality of the government, or a political subdivision thereof, within the meaning of the Social Security Act."

There is no denying that the Public Belt Railroad is an instrumentality of the City of New Orleans which latter is a "political subdivision of a state".

## THE PETITION SHOULD BE DENIED.

We respectfully submit that the Public Belt Railroad Commission for the City of New Orleans is a department or agency of the City of New Orleans; and that the City of New Orleans is a political subdivision of the State of Louisiana. Whether the City of New Orleans, in its operation of said Public Belt Railroad by and through said

department or agency, is acting in its governmental or proprietary capacity is not an issue herein for the simple reason that Sec. 3 (d) justifies no distinction between the governmental and proprietary functions of a municipality. The exclusion or exemption provision of Sec. 3 (d), as stated by the Lower Appellate Court (R. p. 70) "is couched in plain and unambiguous language and should be given effect as written." It is only where the language of a statute is of doubtful meaning, or where adherence to the strict letter would lead to injustice or absurdity or result in contradictory provisions that the court should seek to ascertain the true meaning; but again, as stated by the Lower Appellate Court (R. p. 71):

> "In construing the Act the duty of the Court is to determine what employers and employees are within its coverage, not what employees 'should' have been covered, for the question of who 'should' be covered is a matter solely within the province of the legislative branch of the government. The language of Section 3 (d) being plain, its meaning clear, the result reasonable, we see no reason for resorting to extraneous considerations in an effort to construe and give to such language another and different meaning. Cf. Helvering v. New York Trust Co., 292 U. S. 455; United States v. Mo. Pacific R. Co., 278 U. S. 269."

We respectfully submit that the petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit should be denied.

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